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Supreme Court of the United States.

OCTOBER TERM, 1946.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

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Subject Index.

	Page
Petition	1
Summary of matters involved	1
The questions presented	3
Reasons relied upon for the allowance of the writ	4
Brief	7
I. Opinions of the courts below	7
II. Jurisdiction	7
III. Statement of the case	8
IV. Specification of errors	8
V. Argument	9
VI. Summary	14
VII. Conclusion	14

Table of Authorities Cited.

Cases.

A. W. Duckett & Co., Inc., v. United States, 266 U.S. 149	9, 13
United States v. General Motors Corp., 323 U.S. 373	8, 9, 10, 11
United States v. Petty Motor Co., dec. Feb. 25, 1946 (66 S. Ct. 596)	8, 12

Statutes.

U.S. Constitution, Fifth Amendment	12, 14
Judicial Code as amended, sec. 240 (28 U.S.C. 347)	7

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Summary of Matters Involved.

This petition seeks review of the decision of the Circuit Court of Appeals for the First Circuit affirming the judgment of the District Court entered October 15, 1945 (R. p. 19).

On April 28, 1942, the petition of the United States to condemn a certain portion of real estate in Springfield, Massachusetts, more particularly described in said petition, for a term of years commencing April 28, 1942, and

expiring June 30, 1943, was filed in the United States District Court for the District of Massachusetts (R. pp. 1-10). The petition alleged that the John Hancock Mutual Life Insurance Company, the petitioner herein, claimed to have an interest in the premises as a lessee (R. p. 3, par. (6), and p. 7).

On said April 28, 1942, the District Court issued an order for possession (R. pp. 11-12).

The petition was tried to a jury June 4, 1945, in which said John Hancock Mutual Life Insurance Company, the petitioner herein, proved its leases to each of two portions of the property condemned and the actual possession of the United States for the period of the taking of the premises conveyed by said leases (R. p. 20; p. 23).

The term of each lease was for a period commencing before the taking and ending after the period of the taking (R. pp. 24-38), and in one of them the rent varied within the period of the taking (R. p. 25).

The parties introduced evidence of the fair rental value of the premises taken (R. pp. 20-21).

The court instructed the jury: "Counsel has argued that they may have been liable for future rents even though they were to get out so I am going to say this: If the rent John Hancock Mutual Life Insurance Company was paying on the day it moved is in your judgment a fair market rental of those premises, then John Hancock Mutual Life Insurance Company can recover nothing in this action" (R. p. 23). The petitioner objected to that part of the charge that instructed the jury that the petitioner could recover only in the event that the jury found the rental value to be in excess of the lease value, and requested the court to charge the jury that the defendant was entitled to recover the rental value of the premises for the period taken (R. pp. 21-24).

The court noted the petitioner's objection, saved the petitioner's rights and denied the petitioner's request to instruct the jury that the petitioner was entitled to recover the rental value of the premises for the period taken (R. p. 24).

The jury found for the United States and assessed no damages (R. p. 19).

The petitioner appealed from said judgment (R. p. 19).

The petitioner by its appeal to the Circuit Court of Appeals challenged the judgment of the District Court on the ground that the court erred in instructing the jury as above set forth and that thereby the petitioner was deprived of its property in violation of the Fifth Amendment to the Constitution of the United States.

On June 26, 1946, a petition for rehearing was filed by the petitioner and denied on July 5, 1946, and thereafter, to wit, on July 15, 1946, mandate was stayed until further order of the court.

The jurisdiction of the Supreme Court of the United States is invoked under section 240 of the Judicial Code as amended, United States Code, 1940 Edition, title 28, section 347.

The Questions Presented.

Where a portion of the term of a leasehold is taken by eminent domain for temporary use, is the amount of such compensation to be—

(*a*) what would be the market rental value of the premises taken on a lease by the long-term tenant to the temporary occupier for the period of the taking as contended by the petitioner herein, or

(*b*) the difference between the market rental value and the rent stipulated in the lease on the day of the taking, as the jury were instructed?

Reasons Relied upon for the Allowance of the Writ.

While there have been two recent decisions of this court establishing and differentiating the rule of damages to be applied in the taking of a portion of the term of a lease as in the case at bar and the taking of the whole term of the lease, the District Court has applied a rule which is neither the one nor the other and appears to be in conflict with the decision of this court in the following cases: *United States* v. *General Motors Corporation,* 323 U.S. 373 (1945), and *United States* v. *Petty Motor Company,* decided February 25, 1946 (66 S. Ct. 596).

The Circuit Court of Appeals has improperly applied the decision of this court in *United States* v. *Petty Motor Company, supra,* and has improperly applied the decision of this court in *United States* v. *General Motors Corp., supra,* the result of which has been to deprive the petitioner of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

The petitioner refers to and incorporates in this petition all the matters presented in the "Statement of points on which appellant intends to rely upon Appeal" (R. pp. 39-40) with the same force and effect as if herein set out in detail.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the First Circuit, commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named a transcript of the record and proceedings therein, and that the decision of the Circuit Court of Appeals for the First Circuit and the judgment of the District Court for the District of Massachusetts be reversed by this Honorable Court

and your petitioner have such other and further relief in the premises as to this Honorable Court may seem just and proper.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

By its Attorney,

G. K. RICHARDSON.

Supreme Court of the United States.

OCTOBER TERM, 1946.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

BRIEF ON PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The District Court filed no opinion.

The opinion of the Circuit Court of Appeals for the First Circuit, dated June 12, 1946, is set forth in the Record at pages 43 to 45, inclusive.

II.

Jurisdiction.

Jurisdiction of the Supreme Court of the United States is invoked under section 240 of the Judicial Code as amended.

United States Code, 1940 Edition, title 28, sec. 347.

III.

Statement of the Case.

The statement of the case is fully set forth in the foregoing Petition, under the heading "Summary of Matters Involved," *supra*, pp. 1-3.

IV.

Specification of Errors.

1. The District Court erred in instructing the jury as follows:

> "If the rent John Hancock Mutual Life Insurance Company was paying on the day it moved [meaning the day the United States took possession under order of the court] is in your judgment a fair market rental of these premises, then John Hancock Mutual Life Insurance Company can recover nothing in this action."

2. The Circuit Court of Appeals erred in affirming the correctness of the charge and judgment in that it—

(*a*) failed to apply the rule laid down in *United States* v. *General Motors Corporation*, where, as here, there was a taking of a portion of the term of the lease;

(*b*) misstated by omission of an essential part thereof, to wit, "for the remainder of the tenant's term," the rule in *United States* v. *Petty Motor Company* when the whole term of the lease was taken, as was not the case here, and, as so misstated, applied it to the case at bar;

(*c*) ruled that "no evidence was introduced to show whether the appellant was under a continuing obligation to pay rent."

V.

Argument.

That the taking by eminent domain for temporary use of a portion of the term of the leasehold is compensable under the Fifth Amendment to the Constitution of the United States and that the amount of such compensation is the market value of the interest thus taken is clear from an examination of the opinions in *A. W. Duckett & Co., Inc.*, v. *United States* and *United States* v. *General Motors Corp.*, hereinafter cited.

The charge of the judge limited the amount of the recovery of the petitioner to the excess of the market rental value over the rent reserved in the lease. It is submitted in that respect the charge of the District Court was erroneous and a clear violation of the principles governing compensation for property taken.

> "Ordinarily an unqualified taking in fee by eminent domain takes all interests . . . In such a case we no more should expect to hear it argued that leaseholds were not to be paid for than that the former fee simple should not be, . . . Here the taking purported to be a taking of the Bush Terminal docks, &c.—not of the title of the Bush Terminal Company, . . . Any arrangement that the Government may have made later with the owner to pay to it what might be due to the tenants or some of them did not affect the claimant's rights."
>
> *A. W. Duckett & Co., Inc.*, v. *United States*, 266 U.S. 149 (1924).

"In the light of these principles it has been held that the compensation to be paid is the value of the

interest taken. Only in the sense that he is to receive such value is it true that the owner must be put in as good position pecuniarily as if his property had not been taken. In the ordinary case, for want of a better standard, market value, so called, is the criterion of that value.

". . . The right to occupy, for a day, a month, a year, or a series of years, in and of itself and without reference to the actual use, needs, or collateral arrangements of the occupier, has a value.

". . . The value of such an occupancy is to be ascertained not by treating what is taken as an empty warehouse to be leased for a long term, but what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier."

United States v. *General Motors Corp.*, 323 U.S. 373 (1945).

In the last-cited case Mr. Justice Douglas disagreed with the majority opinion with reference to facts that might be properly considered in arriving at the fair market value. That is to say, he believed these items were items of consequential damage, and hence not compensable. He did, however, assume, as did the majority, that the lessee ought to recover fair market value for that part of lessee's interest which was taken temporarily.

"I likewise agree that respondent is entitled to a further increase in its award. The award granted is less than the rental which it is under a continuing obligation to pay the lessor. The United States is occupying the premises and paying about 40¢ a square foot while respondent continues to pay 42¢ to the landlord. In these special circumstances it is difficult to see how

> a lessee receives that just compensation to which he is entitled unless the United States pays the full rental. It would indeed be a novel rule of law which allowed the Government to oust a person from a portion of his leasehold, occupy the premises, but pay only a part of the rent, leaving the balance to be paid by him who though ousted holds the balance of the term."
>
> *United States* v. *General Motors Corp., supra.*

In the case last cited the respondent, aside from the effect of the facts which the Supreme Court decided should have been given to the jury, was out of pocket only to the extent of the difference between the fair market value as found by the jury and the larger sum reserved in the lease, but in the case at bar the petitioner, under the instructions of the judge to the jury, is out of pocket the whole of the rental value.

The Circuit Court of Appeals recognizes the rule of compensation to be paid the lessee, a portion of whose term is taken as set forth in *United States* v. *General Motors Corporation, supra.* It failed, however, to apply the rule in the case at bar, on the ground that the lessee here had not shown an obligation to pay rent, which will be discussed hereinafter.

At this point, however, we direct the court's attention to the fact that all facts material to the issue here involved were the same as in *United States* v. *General Motors Corporation,* even to the extent of a step-up of rents for different periods.

The Circuit Court of Appeals ruled that, "if the lessee is no longer under such obligation to pay rent, then it is entitled only to the difference of the fair rental value and the rents stipulated in the lease," and applied that rule to the case at bar, even though here, unlike the situation in

United States v. *Petty Motor Company,* the taking was for a portion of the term of the lease only. It will be noted that the court omitted an essential portion of the rule to be applied in such case, to wit, "for the remainder of the tenant's term," and that the District Court in its charge also failed to include such language or the substance thereof.

It is respectfully submitted that the Circuit Court of Appeals erred in two respects; that is to say, *first,* in deciding that the rule in *United States* v. *Petty Motor Company* applied, and *second,* in misstating the rule. Examination of the opinion of the Circuit Court of Appeals makes it clear that it would have reversed the judgment in the case at bar if it found evidence had been introduced to show the appellant was under a continuing obligation to pay rent. Evidence imports fact, so that it is clear the court did not rule that the obligation to pay rent was terminated by operation of law. Petitioner admits it had the duty to establish its interest in the property condemned, but asserts that it carried the burden by introducing the leases themselves, which appear in the record, and the obligation to pay rent under each of them is contained therein (R. pp. 24, 25; p. 32). No citation of authority is required for the principle that, in the absence of proof that the written instrument containing the obligation had been lost or destroyed, the only way the obligation could be proved is by introducing the written instrument itself, as was done in this case.

The ruling of the Circuit Court of Appeals that the petitioner had not proved its obligation to pay rent in effect deprived the petitioner of its property in violation of the Fifth Amendment to the Constitution of the United States. The opinion of the Circuit Court of Appeals contains a note that "Evidence was submitted on appeal tending to show an arrangement by the lessor with the United

States whereby the appellant is probably relieved of the obligation to pay rent. We do not however place any reliance on this evidence since it was not introduced in the Court below." The petitioner is embarrassed how to deal with this note in view of the fact that this evidence was not made a part of the record by the Circuit Court of Appeals. Under the circumstances the petitioner hopes the court will consider we are not presumptuous in discussing it. Under the authority of *A. W. Duckett & Co.* v. *United States, supra,* "Any arrangement that the Government may have made later with the owner to pay to it what might be due to the tenants or some of them did not affect the claimant's rights."

The Government's brief on the appeal was based in part upon the fact that it had leased from the owner the premises in question for a period commencing a certain time after the taking and ending prior to the expiration of the petitioner's leases. Neither this lease nor any evidence thereof was introduced in the District Court, with the result that the Circuit Court of Appeals asked this petitioner if it had any objection to such lease being introduced, and the petitioner said it had not, provided there was also introduced written evidence between the petitioner and the owner that the petitioner had unsuccessfully attempted to get the owner to terminate the leases under paragraph twelfth and paragraph eleventh respectively. This being agreeable to the United States and to the Circuit Court of Appeals, said lease to the Government referred to as "the arrangement" in the note in the opinion of the Circuit Court of Appeals and the letters containing the request of the petitioner for and the refusal of the owner to terminate were introduced.

Thus it appears that not only as a matter of law was the lease in force and the petitioner under a continuing obligation to pay rent, but the petitioner and owner both so

understood. Having received this uncontradicted evidence, justice requires that all of it, the bitter with the sweet, be considered; more especially since, at the trial, as evidenced by the record, including the judge's charge, the parties and the judge recognized there was a continuing obligation to pay future rent. Affirming the judgment on the ground that no such obligation to pay rent was proved is a grievous injustice to the petitioner and, under the guise of a ruling as to the burden of evidence, deprives it of its property in violation of the Fifth Amendment to the Constitution of the United States.

VI.

Summary.

Because—

(1) there has been misinterpretation or improper application of the decisions of the Supreme Court by the Circuit Court of Appeals in the present case,

(2) there has been an erroneous ruling of the Circuit Court of Appeals resulting in depriving the petitioner of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States—

there is here presented a case which ought to be reviewed by this Honorable Court.

VII.

Conclusion.

It is therefore respectfully submitted that the case is one calling for the exercise by this court of its supervisory powers in order that the errors of the Circuit Court of Appeals

for the First Circuit and the District Court may be corrected, and to such end a writ of certiorari should be granted and this court should review the decision of the Circuit Court of Appeals for the First Circuit and finally reverse it.

Respectfully submitted,

By GARALD K. RICHARDSON,

Attorney for JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *Petitioner.*